In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1624

SEARCY BAKER ANDREWS,
CHARLES MASAO JOHNSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Constitutions

Rules

Statutes

Other Authorities

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The petitioners, Searcy Baker Andrews and Charles Masao Johnson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered March 26, 1979.

OPINION BELOW

The Court of Appeals entered its opinion on March 26, 1979. A copy of the opinion affirming the judgments of conviction is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

(1) Did the Court below err in failing to find that the Fourth Amendment and 18 U.S.C. § 2510 *et seq.* require a sufficient showing of probable cause be set forth prior to issuance of the wiretap orders?

(2) Did the Court below err in finding that the requisite necessity requirements of 18 U.S.C. §§ 2518(1)(c) and (3)(c) were satisfied?

(3) Did the Court below err in finding that the minimization requirement of 18 U.S.C. § 2518(5) was satisfied?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 2515:

> Prohibition of use as evidence of intercepted wire or oral communications.
>
> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2518:

> Procedure for interception of wire or oral communications.
>
> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> . . .
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> . . .
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> . . .
>
> (3) Upon such application the judge may enter an *ex parte* order, as requested or as modified, author-

izing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed or is about to commit a particular offense enumerated in section 2516 of this chapter;

. . .

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

. . .

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

. . .

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by

subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

. . .

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

. . .

STATEMENT OF THE CASE

A. Course of Proceedings

Beginning in August, 1975, and continuing through November, 1975, Respondent sought and obtained authorization to conduct a series of five wiretaps on telephones located in three different residences. These wiretaps were directed first to telephones used by Robert Earl Andrews, then telephones used by petitioner Charles Johnson, and finally the telephone used by petitioner Searcy Baker Andrews. On November 30, 1975, both petitioners were

arrested pursuant to warrants based upon information received during the course of the wiretaps.

On December 18, 1975, the Grand Jury for the Northern District of California returned an indictment against both petitioners and 18 co-defendants. Petitioner Andrews was charged in Count 1 with conspiracy to possess with intent to distribute heroin and cocaine and to distribute heroin and cocaine (Title 21, U.S.C. 846). Counts 13, 18 and 24 charged petitioner Andrews with the use of a telephone to facilitate the conspiracy (Title 21, U.S.C. §843(b)). Count 33 charged that petitioner Andrews possessed cocaine in violation of Title 21 U.S.C. 841(a)(1) (CT 3-20).* Petitioner Charles Johnson was charged with conspiracy in Count 1 and with use of a telephone to facilitate a conspiracy in Counts 12, 20, and 21 (CT 3-20).

The evidence presented to the Grand Jury consisted mainly of testimony regarding the contents of intercepted conversations, surveillance resulting from the intercepts, and the fruits of searches and seizures pursuant to warrants obtained based upon information derived from the wiretaps. Various motions to suppress were filed (CT 906-937, 951-957, 998-1011, 1032-1037, 1140-1145, 1237-1247) and heard by the district court in evidentiary hearings beginning June 1, 1976 (RT 1-929). The district court's order denying motions to suppress was filed on June 17, 1976 (CT 1113-1120). Another court order denying further wiretap motions and search and seizure motions was filed September 14, 1976 (CT 1170-1175).

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*Abbreviation Code:
CT—Clerk's Transcript on Appeal
RT—Reporter's Transcript of Pretrial Hearings

Stipulations, saving all objections to admissibility regarding the evidence obtained from the wire intercepts of petitioners Andrews and Johnson were filed on September 30, 1976 (CT 1252-1261, 1299-1351). A court trial held on September 30, and October 5, 1976—pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure—on a set of stipulated facts accompanied by government exhibits (CT 1352 and CT 1353). The vast majority of these exhibits were transcripts of various defendants' telephone conversations. The stipulations further laid foundations for the wiretap transcripts and set out the results of government surveillance of defendants.

On December 2, 1976, the court found petitioner Andrews guilty on all counts (CT 1560). On December 2, 1976, judgment and sentence was imposed for Searcy Baker Andrews of twelve (12) years, $25,000 fine and a special parole of five (5) years as to Count 1, four (4) years each as to Counts 13, 18, 24; twelve (12) years and a special parole term of five (5) years as to Count 33 (CT 1560). The sentences of imprisonment as to counts thirteen (13), eighteen (18) and twenty-four (24) were made to run consecutive to each other and concurrent with counts one (1) and thirty-three (33) of the indictment, and the sentence imposed on count thirty-three (33) of the indictment was to run concurrent with the sentence of imprisonment imposed on Count 1 (CT 1561).

On December 2, 1976, the court entered judgments of conviction as to petitioner Charles Johnson on all counts. Sentence was imposed for Charles Johnson of eight (8) years, and a special parole of five (5) years as to Count 1 and four (4) years each as to Counts 12, 20, and 21. The

sentences of imprisonment as to Counts 12, 20 and 21 were made to run concurrent with each other and concurrent with the sentence of imprisonment of Count 1 of the indictment.

A timely notice of appeal was filed on December 2, 1976 (CT 1573). The Ninth Circuit Court of Appeals affirmed the judgments of conviction of both petitioners on March 26, 1979. (See Appendix A.)

B. Statement of Relevant Facts

In 1975 the Federal Drug Enforcement Administration began an investigation into possible narcotic trafficking by one Robert Earl Andrews and others—including petitioners Searcy Baker Andrews and Charles Johnson. The agents learned of the trafficking initially from an informant (CT 85) (RT 224). The informant was, throughout the duration of the investigation, the mistress of Robert Earl Andrews (RT 225). Some physical surveillance of Robert Earl Andrews, and at least one attempted "buy" from Robert Earl Andrews by an undercover agent, occurred prior to August, 1975.

Beginning in early August, 1975, the respondent sought and received authorization to conduct a series of wiretaps. (See, e.g., CT 37, 38). The first two wiretaps were on phones located in Robert Earl Andrews' residence (CT 37). The third and fourth taps were on phones located in petitioner Charles Johnson's residence. The fifth and final tap was on a phone located in petitioner Searcy Baker Andrews' residence (CT 38). Each application for a wiretap was accompanied by an affidavit of Drug Enforcement Administration Agent Kenneth Wallace, who was the case

agent. (See, e.g., CT 83-97, 99-104, 106-122, 123-135, 137-150.) Each succeeding wiretap was based on information learned from the preceding wiretaps. Each of the subsequent applications incorporated the affidavits supporting the preceding wiretaps.

The wiretaps ran for 74 days over a four month period. The first tap commenced August 18, 1975, and terminated August 25. The second tap commenced August 28, 1975 and terminated September 6, 1975. The third tap commenced September 30, 1975 and terminated October 17, 1975. The fourth tap commenced October 17, 1975 and terminated November 6, 1975. The fifth and final tap commenced November 11, 1975 and terminated November 30, 1975.

Petitioner Searcy Baker Andrews was named as a person whose conversations were likely to be intercepted in all but the first wiretap (CT 84, 100, 107, 124, 138). His conversations were intercepted in all of the wiretaps. Drug related conversations of petitioner Searcy Baker Andrews were intercepted in the third, fourth and fifth wiretaps (CT 106-150, 1203-1209, 12[illegible]-1275). In the affidavit for the third wiretap the government falsely attributed a drug related conversation to petitioner Searcy Baker Andrews (CT 112). Drug related conversations of petitioner Charles Johnson were also intercepted in all the wiretaps.

Numerous agents participated in the wiretapping and attendant surveillance. Logs of calls and tape recordings were made (CT 1251-1291).

As a result of evidence derived from the wiretaps the government secured arrest warrants for both petitioners and arrested them on November 30, 1975.

REASONS FOR GRANTING THE WRIT

I

THE COURT BELOW ERRED IN FAILING TO FIND THAT THE FOURTH AMENDMENT AND 18 U.S.C. § 2510 ET SEQ. REQUIRE A SUFFICIENT SHOWING OF PROBABLE CAUSE BE SET FORTH AS TO PETITIONER ANDREWS PRIOR TO THE ISSUANCE OF WIRETAP ORDERS WHICH RESULTED IN INTERCEPTION OF HIS CONVERSATIONS.

In the August 18, 1975 wiretap application, petitioner Searcy Baker Andrews was not named as a person likely to be intercepted (CT 83-97). He was so named in each of the subsequent wiretap applications. The affidavit supporting the initial wiretap application was incorporated in the subsequent affidavits for each of the later wiretaps.

The initial affidavit (August 18, 1975) was over fifteen pages long, and contained detailed information regarding Robert Earl Andrews' narcotics dealings. The only information regarding petitioner Searcy Baker Andrews is a single statement attributed to a confidential informant that sometime in the past (possibly up to April, 1975) Robert Earl Andrews received his narcotics in part from petitioner Searcy Baker Andrews (CT 86). No other information concerning petitioner Andrews is set forth.

The application for the second wiretap named petitioner Searcy Baker Andrews. The affidavit for the August 28, 1975 wiretap (CT 99-104) incorporated the August 18, 1975 affidavit and stated in pertinent part:

> "3. . . . (a) There is probable cause to believe that Robert Earl Andrews and . . . [Searcy Baker Andrews]

> . . . have been and are now committing offenses involving . . . heroin and cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) . . .
>
> (b) There is probable cause for belief that wire communications concerning these offenses will be obtained through the interception . . .
>
> 4. . . . [incorporation of 8/18/75 affidavit]
>
> . . . In addition, based upon my examination of daily monitoring logs, listening to intercepted calls, and discussions with other agents, interceptions thus far have established that:
>
> . . . . . .
>
> (b) That Robert Earl Andrews and [Searcy Baker Andrews] . . . are conducting a narcotics business.
>
> . . . . . .
>
> 5. That there is probable cause to believe Robert Earl Andrews and [Searcy Baker Andrews]. . . have used and are using the [target phone]."
>
> (CT 99-104).

While otherwise setting forth the results of the first wiretap in detail, no factual assertion is made as to the specifics which support affiant's allegations of probable cause as to petitioner Searcy Baker Andrews. After stating there is probable cause to believe Searcy Baker Andrews is committing the enumerated offenses—based on generalized assertions of listening to unspecified calls, reviewing logs of unspecified contents, having unspecified conversations with other agents, and giving examples of calls of other defendants—the affiant concludes:

> "WHEREFORE, affiant believes the probable cause exists to believe Robert Earl Andrews and [petitioner Searcy Baker Andrews] . . . have been and are com-

mitting offenses involving . . . heroin and cocaine . . . [and] . . . have used and are using and will continue to use the [target] telephone . . ." (CT 103).

The August 28, 1975 application essentially duplicated the affidavit and set forth no more than was set forth in the affidavit. No facts specific to petitioner Searcy Baker Andrews were stated. The order authorizing the tap was issued on the basis of:

". . . Application and order *under oath* having been made before me by John Gibbons . . . , and full consideration having been given to the matters set forth *therein,* and to the affidavits of Kenneth P. Wallace, attached thereto, the court finds:

(a) There is probable cause to believe that . . . Searcy Baker Andrews . . . [etc.]"

(CT 738-742).

The affidavit for the third wiretap (September 30, 1975) incorporates the first affidavit and sets forth a drug related phone call attributed to petitioner Searcy Baker Andrews (CT 112). This phone call was found to be erroneously attributed to petitioner Searcy Baker Andrews (CT 1117). The only other information regarding petitioner Searcy Baker Andrews in this highly detailed affidavit was that petitioner Searcy Baker Andrews had been seen in the company of petitioner Charles Johnson, one of the suspected narcotics traffickers (CT 120). No other facts as to petitioner Searcy Baker Andrews were enumerated. Again the authorizing judge issued the wiretap order based upon the sworn affidavits presented to him.

18 U.S.C. § 2510 *et seq.* was enacted by Congress to make the Fourth Amendment applicable to electronic surveillance. The inter-relationship between 18 U.S.C. §§ 2518(3)(a), 2518(1)(b), and 2518(4)(a) clearly establishes that Congress intended Title III to impose a requirement that the wiretap application contain a factual basis for establishing probable cause to support the conclusion that a particular named person is committing a specific offense and will be intercepted.

The legislative history of § 2518(a) supports the position that the statute requires a showing of probable cause as to each person named, thus reflecting the Fourth Amendment's constitutional requirement.

"Subparagraph (a) requires that the judge determine that there is probable cause for belief . . . [that the enumerated offense] . . . is being, or has been . . . committed *by a particular person* . . . With the findings required by subparagraphs (a) and (b), the order will link up *specific person, specific offense* and *specific place.* Together they are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirements of particularity."

2 *U.S. Code Cong. & Admin. News,* 2112, 2191 (1968) (emphasis added).

The Senate Report in turn cited to *Berger v. New York,* 388 U.S. 41, 58-60 (1967). In *Berger,* this Court construed the constitutional sufficiency of a New York wiretap statute which required, *inter alia,* "the naming of the person or persons whose communications . . . are to be overheard. . ." *Berger* held the mere naming of persons, while necessary, was *not* enough. *Id.* at 58-60. The legislative history citation to this specific portion of *Berger* supports the reading

of 3(a)'s "individual" to be those persons named in the order. *As to those persons* a *factual basis supporting probable cause must be shown,* since a specific item—a conversation of that particular person—is sought to be seized. That was not done as to petitioner Andrews in the present case.

This Court has repeatedly held that the provisions of Title III must be strictly construed. *United States v. Chavez,* 416 U.S. 526 (1974); *United States v. Giordano,* 416 U.S. 505 (1974).

The Court of Appeals, relying upon *United States v. Donovan,* 429 U.S. 413 (1977), held Fourth Amendment requirements were satisfied in the present case by "identification of the telephone line to be tapped and the particular conversations to be seized," and rejected the contention that probable cause must be stated in the current application for each person named therein as a probable converser. This holding disregards the statutory language in which the "individual" referred to in § 2518(3)(a) is the person or persons named in § 2518(1)(b)(iv), (4)(a), and (3)(d). Not only do §§ (1)(b)(iv), (3)(d) and (4)(a) encompass § (3)(a), but also § (3) refers back to the specific factual showing required in § (1).

Moreover, in *United States v. Donovan, supra,* this Court held that § 2518(1)(b)(iv) requires that all persons, for whom the government has probable cause, be named in the wiretap order. *Id.* 97 S.Ct. at 668. In so holding, this Court specifically rejected the "principal target" analysis adopted by the Court of Appeals below. In adopting the "target" analysis, the court below failed to consider petitioner Andrews' right not to be overheard on a Title III

wiretap unless all of Title III's requirements as to a person named in the application—i.e., petitioner Andrews—are satisfied.

The Court of Appeals policy analysis in support of its probable cause holding is equally unpersuasive. Reasoning from *Donovan's* requirement that an agency name all persons in its wiretap application for whom a probable cause showing can be made, the court below concluded that the agency would be overburdened if it had to make such a probable cause determination and showing for each person named. This burden is precisely that which Congress envisioned when it enacted the detailed and exacting standards of Title III. Further, the Court of Appeals apparently overlooked the fact that a district court judge must review the wiretap applications—before signing a Title III wiretap order—to determine if the probable cause standard has been met as to each person named. Surely that judicial officer is capable of assessing correctly the probable cause showing offered as to each named individual. Thus, contrary to the statement of the court below, the investigating agents are not burdened to any significant extent since they merely have to make a factual showing to the judge in the *ex parte* application. The judge, not the investigating agency, ultimately decides if probable cause has been established as to the named individuals in the application. This "burden" is precisely that which a judge must hear repeatedly in assessing probable cause for issuing complaints and in ruling on suppression motions where a probable cause issue is involved.

In failing to recognize that Title III's protection of petitioner's Fourth Amendment and statutory privacy rights

were abridged by the absence in the wiretap application of facts upon which the judge could make the ultimate probable cause determination with respect to petitioner Andrews—an individual named in the application—the court below erred. This Court should grant the petition for a writ of certiorari to resolve this fundamental question regarding electronic surveillance.

II

THE COURT BELOW ERRED IN FINDING THAT THE REQUISITE NECESSITY REQUIREMENTS OF 18 U.S.C. §§ 2518(1)(c) and (3)(c) WERE SATISFIED.

The requisite necessity requirements of 18 U.S.C. §§ 2518 (1)(c), and (3)(c) are to be given a practical, commonsense interpretation; wiretap, therefore, need not be resorted to only as a last resort. *United States v. Kerrigan,* 514 F.2d 35 (9th Cir.), *cert. denied,* 423 U.S. 924 (1975). However, before a wiretap authorization can properly issue, the applicant must, at the very least, make a full factual showing that other investigative techniques reasonably appear unlikely to succeed if tried. *United States v. Kalustian,* 529 F.2d 585 (9th Cir. 1975).

Both petitioners asserted below, and assert here, that the application in support of the August 18, 1975 wiretap request was totally deficient under §§ 2518(1)(c) and (3)(c). Since all subsequent wiretap orders and evidence derived as the fruits of this deficient application, suppression of all the evidence from the August 18, 1975 and subsequent taps is required. *Wong Sun v. United States,* 371 U.S. 471 (1963).

The affidavit in support of the application for the August 18, 1975 wiretap is inadequate because it fails on its face to establish requisite necessity for a wiretap; it contains substantial material false statements; it states facts which militate strongly against a finding of requisite necessity; and numerous facts known to the Drug Enforcement Administration which would have negated a requisite necessity finding were omitted from the affidavit.

The application does not contain a detailed and complete factual statement which establishes why normal investigative procedures were unlikely to succeed if tried. As presented to the authorizing court (CT 793-822, 923), the government's application makes only a few, vague "factual" claims, key among which were the assertions that Robert Earl Andrews did not sell drugs to new customers who would not use drugs in his presence, and that physical surveillance would be impossible due to the geographic make-up of the area and the large number of drug users who frequented it. The applicant then concludes that "such" techniques—presumably controlled buys by agents and surveillance—would not show the scope of a conspiracy nor would they "provide enough evidence" to "arrest, indict, or convict" the conspirators. No further facts are set forth to explain the "factual" assertions concerning Robert Earl Andrews' mode of operations or illuminating the "unsuccessful" surveillance efforts attempted.

The affidavit is equally deficient. Drug Enforcement Administration Agent Wallace stated in the affidavit (CT 96) that physical surveillance would be impossible, without providing any facts to support his assertion. Further, the

Wallace affidavit mentions that two informers were unwilling to testify, but makes no mention of whether or not the informers have been offered immunity. Furthermore, the affidavit provides a detailed description of the ease with which a Drug Enforcement Administration Agent had in fact met with Robert Andrews in an attempt to purchase drugs. Since these "factual" allegations are conclusory, internally inconsistent, and fail to establish why other techniques such as pen registers, consent calls, controlled buys, ordinary search warrants, informant testimony under immunity grants, Drug Enforcement Administration infiltration, or cooperation with local law enforcement authorities, would be unsuccessful, the requisite necessity standard has not been met. See *United States v. Curreri,* 388 F. Supp. 607 (D. Md. 1974); *United States v. Kalustian,* 529 F.2d 585 (9th Cir. 1975).

Furthermore, there were substantial false material representations in the affidavit and application that undermine the requisite necessity showing. Despite statements in the Wallace affidavit that the informant would not testify, the evidence adduced at the suppression hearing established that the informant would testify (CT 793-822; RT 243). In addition, government investigative reports provided to the defendants, and testimony of government agents established that successful surveillance had been conducted of Robert Andrews' Vernon Street apartment when the narcotics trafficking occurred (CT 793-822). The testimony at the evidentiary hearing also refuted the Wallace affidavit assertions that Drug Enforcement Administration Agents were unable to deal in an undercover capacity with Robert Earl Andrews (CT 793-822). If the Wallace affidavit, therefore, is stricken in its entirety, or even stricken only as to the material misrepresentations, (see *United States v. Damitz,* 495 F.2d 50 (9th Cir. 1974)), the government's requisite necessity showing fails to meet the statutory standards.

Information developed by the defense during pretrial proceedings (CT 793-822) established that numerous facts which were relevant to the determination of requisite necessity were known to the Drug Enforcement Administration as of August 18, 1975, and were omitted in the affidavit. These omissions misrepresented the true picture of the Drug Enforcement Administration's access to normal techniques to investigate the alleged conspiracy.

Wallace omitted the following material information: (1) that one Mona Lisa Martini lived with Robert Earl Andrews for over two years; (2) that Martini was Robert Earl Andrews' dope-runner and picked up narcotics for Robert Earl Andrews; (3) that Martini was on the government payroll; (4) that Mona Lisa Martini knew virtually all the persons in this case (CT 793-822); and (5) that Mona Lisa Martini spoke with these persons over the phone (CT 793-822; RT 223-290). Wallace also failed to inform the court that in addition to Mona Lisa Martini and one "Dirty Harry", other informants with access to Robert Earl Andrews were known to Drug Enforcement Administration and not used (CT 793-822). Wallace also suppressed the fact that the Drug Enforcement Administration failed to use local and state police resources to investigate the case, and to develop other investigative leads.

In ruling on the requisite necessity issue, the Court of Appeals failed to consider the variety of serious deficiencies in the government's requisite necessity showing. Since

the requisite necessity provisions are at the heart of Title III's carefully drawn standards, this Court should grant certiorari in order to articulate clearly what factual showing the respondent must make to satisfy §§ 2518(1)(c) and (3)(c).

III

THE COURT BELOW ERRED IN FINDING THAT THE MINIMIZATION REQUIREMENT OF 18 U.S.C. § 2518(5) WAS SATISFIED.

The minimization requirement reflects the congressional intent that wiretapping not supplant traditional investigative methods. *United States v. Giordano,* 416 U.S. 505 (1974). The limited use of wiretapping has been mandated by Congress through the § 2518(5) requirement that the interception of a telephone call be terminated as soon as possible so that unnecessary intrusion is minimized.

In the present case, the wiretapping lasted 74 days over a four month period and intercepted 4,000 telephone calls. While the standard for testing minimization is "reasonableness" (see *United States v. Chavez,* 553 F.2d 491 (9th Cir.,) *cert. denied,* 96 S.Ct. 2237 (1976)), reasonableness must be determined in light of the life of the wiretapping. *United States v. Abascal,* 564 F.2d 891 (9th Cir. 1977) *cert. denied sub nom. Frakes v. United States* ..... U.S. ....., 98 S.Ct. 1521 and ..... U.S. ....., 98 S.Ct. 1583 (1978). Further, the method of minimization (i.e. discontinuance of interception of innocent calls), must be considered in assessing § 2518(5) compliance.

Respondent conceded below that by its own count, hundreds of non-drug and non-criminal calls were intercepted.

Further, after the first seven days of wiretapping, respondent had identified no fewer than thirteen people as targeted conspirators, including both petitioners. Considering that respondent had already secured the cooperation of a confidential informant (Martini) who resided at the Robert Andrews' apartment which was the subject of the wiretap, it is inconceivable that further wiretapping—at least after September 7, 1975—was necessary. Thus, at that time or earlier, the failure to terminate the wiretap ran afoul of minimization requirements and mandates the suppression of all evidence derived subsequent to the time—no later than September 7, 1975—when § 2518(5) required termination of wiretapping.

In rejecting petitioners' minimization argument, the Court of Appeals' opinion failed to recognize the overall duration of the wiretaps, and did not consider the quality of the evidence obtained at an early stage of the wiretapping, or the other investigative means available during the wiretapping. By focusing exclusively on the 37 day wiretap of petitioner Johnson's phone, the court below failed to apply the minimization standards properly. Accordingly, this Court should grant the petition for a writ of certiorari to resolve this important electronic surveillance issue.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: April 18, 1979.

Respectfully submitted,

MARCUS S. TOPEL
PAUL D. WOLF

By MARCUS S. TOPEL
Attorneys for Petitioners

(Appendix Follows)

APPENDIX A

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs.	
Anthony Martin,	No. 77-1271
Nolan Allen Hall,	No. 77-1272
Searcy Baker Andrews,	No. 77-1281
Charles Masao Johnson, a/k/a Chas,	No. 77-1282
Stephen Bruce Davenport, a/k/a Steve Davenport,	No. 77-1338
Lewis Nathaniel Dixon, a/k/a Baby Boy, B.B. and Pretty Boy Floyd, Defendants-Appellants.	No. 77-1619

[Filed Mar. 26, 1979]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: WALLACE and HUG, Circuit Judges, and GRANT*, District Judge

HUG, Circuit Judge:

Searcy Baker Andrews, Charles Johnson, Anthony Martin, Lewis Dixon, Nolan Hall and Stephen Davenport

*Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

appeal from their convictions for violations of federal laws relating to the distribution and possession of illegal drugs.

Defendants Andrews, Johnson, Hall and Martin were convicted after a two-day trial before the court, the primary evidence considered by the court being facts stipulated to by the prosecution and the defense. Defendants Davenport and Dixon were convicted after a jury trial. All of the convictions arose from the same set of events, and the cases have been consolidated on appeal. Although the appellants challenge their convictions on numerous grounds, the principal issues presented for review concern the admissibility of evidence obtained through the use of wiretaps and the requisite elements of the crime of facilitation of the commission of a felony. We affirm as to all parties except Davenport. We affirm his conviction for attempted possession of narcotics, but reverse his conviction for facilitation of the drug conspiracy.

I.

COURSE OF THE PROCEEDINGS

All defendants were charged in one count with conspiracy to distribute, and to possess with the intent to distribute, heroin and cocaine, in violation of 21 U.S.C. § 846. All defendants except Davenport were convicted of this charge. The jury acquitted Davenport of the conspiracy charge, but convicted him of attempted possession of cocaine or heroin.

All defendants were charged in various counts with use of a telephone to facilitate a conspiracy in violation of

21 U.S.C. § 843(b), and each was convicted on one or more counts arising out of these charges. Except in the case of Davenport, the sentence imposed on each defendant was ordered to run concurrently with his sentence for the conspiracy conviction. In Davenport's case, the sentence was ordered to run concurrently with the sentence for the attempted possession charge.

Andrews was also convicted of the substantive offense of possession with the intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). The sentence imposed was ordered to run concurrently with the sentence for the conspiracy conviction.

II.

FACTS

In mid-1975, the Drug Enforcement Administration (DEA) instituted an investigation into what they believed to be a highly sophisticated drug ring involving some of the appellants. To facilitate this investigation, in August of 1975 the DEA sought and received authorization to conduct a series of wiretaps. The primary basis for the appeals of the defendants revolves around the validity of these wiretaps under 18 U.S.C. § 2518, since the most significant evidence offered by the government in the prosecution below was obtained by means of these wiretaps.

The initial wiretap was ordered on August 18, 1975. The issuing court authorized a wiretap on the phone of Robert Earl Andrews, a defendant who is not a party to this appeal, authorizing the interception of the conversations of "Robert Earl Andrews and others as yet unknown". This

authorization, although potentially effective for 20 days, was terminated after seven days, since the phone at the residence was replaced. On August 28, a new wiretap was ordered on this phone, naming Robert Andrews and appellants Searcy Baker Andrews and Charles Johnson as probable conversers. This wiretap was terminated after ten days.

On September 30, the issuing judge authorized a tap on the two phones in Johnson's residence, this order naming as probable conversers appellants Johnson and Andrews, other persons not parties to this appeal and "persons unknown". Although initially effective for 20 days, this wiretap was renewed after 17 days. A new order was issued on October 17, renewing the prior wiretap on Johnson's phones for another 20 days. This second order named appellants Johnson, Andrews, Martin and Hall as probable conversers. The tap was terminated at the end of 20 days.

On November 11, the issuing judge authorized the wiretapping of appellant Andrews's phone. Named as probable conversers were Searcy Baker Andrews, Charles Johnson and "others unknown". This tap lasted for the full authorized period of 20 days.

In addition to comprising a crucial portion of the evidence offered at trial, the information obtained through these wiretaps served other functions as well. Some of the information obtained from the earlier wiretaps was incorporated into the affidavits in support of the later wiretaps. Additionally, with the evidence obtained from these wiretaps, affidavits were drawn up in support of search and arrest warrants which were ultimately used against the

appellants. Pursuant to these latter warrants: (1) Andrews was arrested in his car; on the floor of his car, behind the driver's seat, a leather bag was found which contained cocaine; (2) drugs were seized at the residence of roommates Martin and Hall; (3) guns located in Dixon's bedroom, within his reach, were seized; and (4) Johnson's residence was searched, but the only evidence seized that had any impact in the proceedings below, were his two telephones.

III.

ISSUES INVOLVED

The issues we are called upon to decide in this appeal are:

(1) Whether the evidence obtained from wiretaps should have been suppressed for various reasons;

(2) Whether a person who merely attempts to purchase a drug for his own use from a member of a conspiracy to sell that drug can be convicted, by that act alone, of facilitation of a conspiracy within the meaning of 21 U.S.C. § 843(b);

(3) Whether the search of Johnson's residence was illegal, justifying reversal;

(4) Whether the failure of Dixon's motion for severance or mistrial was reversible error;

(5) Whether the admission into evidence of guns found in Dixon's apartment was reversible error; and

(6) Whether there was sufficient evidence to support Andrews's conviction for possession of cocaine with the intent to distribute.

IV.

WIRETAP ISSUES

We turn first to the various contentions of appellants that the wiretaps were unlawful and that the evidence derived therefrom should have been suppressed. We are concerned here with both a Fourth Amendment requirement and the requirements under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The statutory requirements may, of course, be more restrictive than the requirements of the exclusionary rule for Fourth Amendment violations.

Section 2515 of 18 U.S.C. prohibits the receipt in evidence of the contents of a communication, or evidence derived therefrom, if the disclosure would be in violation of the Act. That section is triggered by § 2518(10)(a), which provides in part:

> Any aggrieved person . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the ground that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Section 2518(1)-(8) sets out the procedures and requirements in order to obtain a valid order to place a wiretap on the telephone and subsequent requirements of the agency following the wiretap.

A. *Naming of Probable Conversers in Wiretap Application.*

Andrews argues that the trial court erred in declining to suppress evidence obtained through the wiretaps authorized by the orders issued on August 28 and September 30. He contends that the Fourth Amendment and 18 U.S.C. § 2518 (1)(b)(iv) and (3)(a) require that the application for wiretap authorization set forth sufficient facts to allow the issuing judge to conclude that there is probable cause to believe that each person named in the application as a probable converser is committing an offense. Andrews argues that he was named as a probable converser in the application, but that the DEA did not then have probable cause to believe that he was committing an offense.

There is nothing in the Fourth Amendment that imposes a requirement of the type urged by Andrews. In *United States v. Donovan,* 429 U.S. 413 (1977), the Court stated:

> The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized.

Id. at 427, n.15. There is no constitutional requirement that the persons whose conversations may be intercepted be named in the application. *Id.* Consequently, we hold that the Fourth Amendment does not require that the reasons for naming all probable conversers be shown in the application.

The question concerning the requirements of the statute is not as easily resolved. The subject of our inquiry is the

statutory section governing the procedure for obtaining wiretap authorization, 18 U.S.C. § 2518.

An application for an order authorizing a wiretap must include the "identity of the person, if known, committing the offense and whose communications are to be intercepted". 18 U.S.C. § 2518(1)(b)(iv). The judge to whom the application is submitted may enter an order authorizing a wiretap if the application shows that "there is probable cause for belief that an individual is committing, has committed, or is about to commit" an offense enumerated in § 2516. 18 U.S.C. § 2518(3)(a). In *United States v. Kahn,* 415 U.S. 143, 150-155 (1974), the Supreme Court held that the investigative agency does not have to name in its application a probable converser who it does not have probable cause to believe is engaged in the criminal activity under investigation. The Court later held in *Donovan* that § 2518(1)(b)(iv) does require the investigative agency to name in its application *every* probable converser who it has probable cause to believe is engaged in the criminal activity under investigation. 429 U.S. at 423-28. In effect, Andrews now urges us to hold that § 2518(1)(b)(iv) and (3)(a) require that *only* those for whom such probable cause is shown may be named in the application. We disagree.

At the outset we note that there is nothing in the wording of the statute itself that compels us to adopt Andrews's position. Section 2518(1)(b)(iv), as construed in *Donovan,* describes those persons who *must* be named in the application; it does not expressly prohibit the investigative agency from naming other individuals in the application. Section 2518(3)(a) permits a judge to issue an authorization order upon a showing that probable cause exists with respect to *an individual;* it does not expressly require a similar showing with respect to *each person* named in the application.

A restriction that the investigative agency can name in its application only those for whom probable cause exists is not consistent with the policy of Title III. The provisions of Title III were designed to accommodate two competing policy objectives: (1) the authorization of electronic surveillance as a weapon against organized crime; and (2) the protection of individual privacy. *Kahn,* 415 U.S. at 151. Section 2518(8)(d) of the Act requires that each person named in the application be given notice (which is denominated as an "inventory") within a reasonable time after the entry of the authorization order or the denial of the application, which shall contain the fact of the entry of the order, the date of the entry and the fact that during the period, wire and oral communications were or were not intercepted. It is mandatory to send the notice to those persons named in the application, but it is discretionary as to whether notice is to be sent to persons not named in the application. Therefore, the policy of protecting persons from unreasonable invasions of privacy is furthered by naming in the application all those persons likely to have their conversations intercepted, whether or not probable cause exists as to them, because those persons will benefit from the mandatory statutory notice requirements. In cases where probable cause is doubtful as to some conversers, an investigative agency should be encouraged to name more, rather than fewer, persons in the application.

In addition, the competing policy objective of aiding law enforcement would be frustrated if an investigative agency were required to make a showing of probable cause for every person named in the application. Under *Donovan,* the agency is required to name all persons for whom a showing of probable cause can be made. If the agency order can later be challenged on the ground that probable cause did not exist for one or more of the expected conversers, an impossible burden of exactness is imposed upon the agency in making a decision on which reasonable minds may differ. The policy behind the statute is best served by allowing latitude in naming an expected converser, even though probable cause as to that person ultimately may not be found.

In rejecting the argument that a defendant must be arrested when probable cause is first established, so that the right to counsel during questioning would be triggered, the Supreme Court considered the dilemma posed by that argument:

> The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment, if they wait too long.

Hoffa v. United States, 385 U.S. 293, 310 (1966). We cannot believe that Congress intended to create a similar dilemma for law enforcement agencies attempting to follow the guidelines of § 2518.

B. *Failure to Name Persons in Application and to Provide Notice.*

Martin and Hall contend that the wiretap order issued on September 30 was improper because neither was named in the wiretap application, even though each was a probable converser who the investigative agency had probable cause to believe was committing the offense under investigation. Martin also complains that he was not provided with the "inventory" required by § 2518(8)(d). Both argue that evidence obtained from these wiretaps should have been suppressed pursuant to 18 U.S.C. § 2518(10)(a)(1).

As discussed in the previous section, the DEA was required by 18 U.S.C. § 2518(1)(b)(iv) to name in its wiretap application each probable converser who it had probable cause to believe was committing an offense. *United States v. Donovan,* 429 U.S. at 423-28. Additionally, those persons named in the wiretap applications are entitled to the inventory, designed to inform the persons of the filing of the application, whether an order was entered and, if so, the dates of the wiretap and whether oral communications were intercepted. 18 U.S.C. § 2518(8)(d). However, in *Donovan,* the Supreme Court held that §§ 2518(1)(b)(iv) and (8)(d) do not play substantive roles in the statutory framework to substantially implement the congressional intention to limit the use of intercept procedures; and therefore that failure to comply fully with those provisions does not invalidate an order authorizing a wiretap. 429 U.S. at 432-39.

There is a suggestion in *Donovan* that suppression would be justified if government agents *intentionally* withheld the

names of suspects from its application. 429 U.S. at 436, n. 23. There is no indication of such conduct in this case.

Therefore, even assuming that those sections were violated, appellants were not entitled to the suppression of evidence.

C. *Misstatement in Affidavit.*

Andrews contends that a misstatement in the affidavit supporting the application for the September 30 order to tap Johnson's telephone erroneously attributed a drug-related phone call to him, and therefore requires suppression of the evidence obtained from the wiretap.

We first consider whether exclusion was required because of a Fourth Amendment violation. In *United States v. Hole,* 564 F.2d 298 (9th Cir. 1977), we held that even a material misstatement in an affidavit supporting a search warrant will not invalidate the warrant under the Fourth Amendment, if the misstatement was "made in good faith and neither intentionally nor recklessly". *Id.* at 301-302. In the present case, the district court determined that the misstatement was innocent. Our review of the record fully supports this finding.

Moreover, we note that the misstatement in this case was not material. The phone call should have been attributed to Johnson. There was, however, probable cause to believe that Johnson, who was also named in the application, was committing an offense enumerated in the statute; therefore, there was probable cause for the issuing judge to authorize the wiretaps on Johnson's phones. *See* 18 U.S.C. § 2518(3)(a). There was no Fourth Amendment violation.

We next consider whether Andrews was entitled to suppression under the statute, 18 U.S.C. § 2518(10)(a)(1) on

the ground it was unlawfully intercepted. Whether suppression is required under the statute is determined from the provisions of Title III rather than from the exclusionary rule developed to deter violations of the Fourth Amendment. *United States v. Giordano,* 416 U.S. 505, 524 (1974). We have earlier held that the naming of an expected converser against whom there may not have been probable cause does not vitiate the order. There is nothing in the express provisions of the statute which requires that an innocent and immaterial misstatement in the application for wiretap authorization invalidates the wiretap order. *See United States v. Turner,* 528 F.2d 143, 156-58 (9th Cir.), *cert. denied sub nom. Grimes et al v. United States,* 423 U.S. 966 (1975) (reasonable and good faith effort to comply with the minimization requirements). The misstatement in the application for the wiretap authorization, which was both innocent and immaterial, does not entitle Andrews to suppression under either Fourth Amendment or statutory standards.

D. *Necessity.*

All parties to this appeal join in Johnson's argument that the DEA failed to make an adequate showing of the necessity for wiretaps as required by 18 U.S.C. § 2518(1)(c) and (3)(c). We disagree. The judge who authorizes a wiretap has considerable discretion to determine whether an adequate showing of necessity has been made. *United States v. Smith,* 519 F.2d 516, 518 (9th Cir. 1975). An investigative agency is not required to exhaust all possible investigative techniques before resorting to a wiretap. *Id.* In this case, the DEA made a showing that it had unsuccessfully attempted to investigate the parties to the co-

spiracy using several methods short of electronic surveillance. We conclude that the trial court correctly found that an adequate showing of necessity was made.

E. *Duration.*

The appellants also contend that the duration of the wiretaps was not properly minimized, as required by 18 U.S.C. § 2518(5). The length of time during which a wiretap is used is a crucial factor in determining whether there has been reasonable minimization of communications intercepted. *United States v. Chavez,* 533 F.2d 491, 493 (9th Cir.), *cert. denied,* 426 U.S. 911 (1976). In this case, the longest wiretap on any one set of telephones was that placed on Johnson's phones. The initial wiretap and the extension of the wiretap together extended over a period of 37 days. In light of the significance of Johnson's involvement in the conspiracy and the state of the investigation at the time the extension was granted, we think this period was reasonable. The wiretaps on the other phones were used only for brief periods of time and were also reasonable.

V.

FACILITATION OF THE CONSPIRACY

Dixon, Johnson, Andrews and Davenport contest the validity of their convictions under 21 U.S.C. § 843(b) for the use of a telephone to facilitate the conspiracy to possess with the intention to distribute and to distribute cocaine or heroin. We do not reach the contentions of Dixon, Johnson and Andrews, for the reason that their sentences under this conviction run concurrently with the sentences on the conspiracy conviction which we affirm. This circuit

follows the concurrent sentence doctrine under which the appellate court, as a matter of discretion, may decline to review a conviction under one count if a conviction under another count is affirmed and the sentences run concurrently and no adverse collateral legal consequences for the appellant result from the additional conviction. *United States v. Wall,* 577 F.2d 690, 699 (9th Cir. 1978). We find no adverse collateral legal consequences to these applicants; and, in the exercise of our discretion, we decline to review these appellants' arguments on this issue.

Appellant Davenport's sentence on the felony facilitation count runs concurrently with the misdemeanor conviction for possession. However, he received a three-year sentence on the felony count, suspended to six months' confinement, with three years' probation upon release from confinement, whereas he received a sentence of six months only on the misdemeanor. We must therefore review the conviction on the facilitation count.

Davenport's appeal on this count presents us with a question of interpretation of 21 U.S.C. § 843(b), which prohibits the use of a telephone to facilitate certain drug-related felonies.[1]

Davenport specifically was charged in Count 19 of the indictment as follows:

> On or about October 28, 1975, in the State and Northern District of California, STEPHEN BRUCE

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[1]Section 843(b) provides in part: "It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter . . . ." (being the subchapter dealing with drug-related offenses)

> DAVENPORT, aka Steve, defendant herein, did, in violation of Title 21, United States Code, Section 843(b), knowingly and willfully use a communication facility namely, a telephone, in facilitating a conspiracy to possess with intent to distribute and to distribute heroin and cocaine, in violation of Title 21, United States Code, Sections 846 and 841(a)(1).

The telephone call specified in the indictment as the basis for the charge was a telephone call between Davenport and Johnson, in which Davenport attempted to purchase a small amount of cocaine. The evidence does not support a finding that Davenport knew of the existence of the conspiracy to distribute, nor that he had any involvement in the distribution of cocaine or heroin himself. Davenport, in the telephone conversation was, at most, attempting to purchase cocaine for his personal use.

Although there was some effort by the prosecution to establish from the telephone conversation that Davenport was attempting to acquire cocaine for distribution, the small amount be sought to obtain (2-4 grams) is not ordinarily consistent with an intent to distribute. There was mention in the conversation of wishing to borrow scales to "weigh something out" and of "splitting it up", but it was apparent from the testimony of an expert witness and a lay witness associated with Davenport that this had nothing to do with the cocaine conspiracy, but rather, related to the division of some marijuana that he and a friend had purchased. Furthermore, it is evident from a careful review of the transcript, the instructions of the court, and the numerous questions from the jury concerning those instructions, that both the judge and the jury were of the opinion that Davenport was not attempting to purchase

cocaine for distribution, but was attempting to purchase cocaine from Johnson for his own use.

The basic premise of Davenport's argument is that a purchaser's relationship to the distribution conspiracy from which he buys is of such a marginal nature that he cannot be considered a "facilitator" within the meaning of the statute. Simply stated, he argues that a buyer cannot facilitate the very sale which creates his status. The government argues that a conspiracy is on ongoing enterprise, a continuing agreement, and that buyers encourage and facilitate the continuation of that agreement through their purchases. In spite of its logical appeal, the strength of the government's argument breaks down in the fact of contrary considerations.

We have found no decisions of this circuit which lend support to the government's position that the distribution of drugs or an agreement to distribute drugs is "facilitated" by a purchaser of the drugs. In each case in which we have upheld a conviction for facilitation, the defendant's role in the distribution of drugs has been far more substantial than that of a buyer for personal consumption. *E.g., United States v. Turner,* 528 F.2d 143 (9th Cir.), *cert. denied sub nom. Grimes et al. v. United States,* 423 U.S. 996 (1975)(conspirator); *United States v. Padilla,* 525 F.2d 308 (9th Cir. 1975)(conspirator/seller); *United States v. Smith,* 519 F.2d 516 (9th Cir. 1975)(conspirator); *United States v. Veon,* 474 F.2d 1 (9th Cir. 1973)(sellers).

In *Rewis v. United States,* 401 U.S. 808 (1971), the Supreme Court approved the Fifth Circuit's ruling in *Rewis v. United States,* 418 F.2d 1218 (5th Cir. 1969), which held

that a gambler whose participation in a gambling business was only that of a better, and not a proprietor, could not be found guilty of acting with intent to facilitate the unlawful gambling activities in violation of 18 U.S.C. § 1952. The Supreme Court agreed that "intent to . . . facilitate" requires more than a mere "desire to patronize the illegal activity". *Rewis, supra* at 811. Therefore, a mere customer did not facilitate the business he patronized. This interpretation of the ambiguous term "facilitation" was supported in the opinion by the legislative history behind the statute in question, and by reference to the general principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity . . .". *Accord, United States v. Bass,* 404 U.S. 336, 347 (1971). Our circuit has since applied this interpretation of the term "facilitation" under 18 U.S.C. § 1952 in *United States v. Gibson Spec. Co.,* 507 F.2d 446, 450-5 (9th Cir. 1974). A difference in the nature of the illicit business should not change the basic principle enunciated by the Supreme Court and by our circuit that a mere customer's contribution to the business he patronizes does not constitute the facilitation envisioned by Congress.

Our conclusion is also supported by the legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which § 843(b) is a part. The scheme of the Act shows that Congress intended to draw a sharp distinction between distributors and simple possessors, both in the categorization of substantive crimes and in the resultant penalties. *See United States v. Swiderski,* 548 F.2d 445, 449-50 (2d Cir. 1977) (discussing legislative history). To hold that persons who merely buy

drugs for their personal use are on equal footing with distributors by virtue of the facilitation statute would undermine this statutory distinction. Davenport's conviction on the facilitation count is therefore reversed.

VI.
OTHER CONTENTIONS

A. *Johnson.*

Johnson contends that federal officers improperly broke into his residence to execute a search warrant, in violation of 18 U.S.C. § 3109. However, the only objects obtained in that search were Johnson's telephones and the corresponding telephone numbers. The telephones themselves did not contribute to Johnson's conviction, and the telephone numbers were already known to the DEA. Therefore, even assuming a violation of the statute, Johnson has not shown that he is entitled to any relief.

B. *Dixon.*

Dixon challenges the trial court's refusal to grant his request for a severance, or alternatively, a mistrial. The denial of a motion for severance is a matter largely within the discretion of the trial judge. *United States v. Kennedy,* 564 F.2d 1329, 1334 (9th Cir. 1977), *cert. denied sub nom. Myers v. United States,* 435 U.S. 944 (1978). Neither a denial of a severance motion nor a denial of a motion for mistrial will be overturned absent a clear showing of prejudice. *See United States v. Nace,* 561 F.2d 763, 769 (9th Cir. 1977). Dixon has not shown that he was entitled to a severance nor that he ultimately suffered any prejudice from the joint trial. On the record before us we cannot say that the trial court erred in denying Dixon's request.

Dixon also contends that the admission into evidence of guns that were seized from his residence constituted reversible error. He argues that the guns were irrelevant and highly prejudicial. The guns were, however, relevant to show Dixon's involvement in the narcotics trade. *See United States v. Wiener,* 534 F.2d 15, 18 (2d Cir.), *cert. denied,* 429 U.S. 820 (1976). Whether the prejudicial effect of evidence so far outweighs its probative value that the evidence should be excluded is a determination in which the trial court is given wide discretion. *E.g., United States v. Mahler,* 452 F.2d 547 (9th Cir. 1971), *cert. denied,* 405 U.S. 1069 (1972). Under the facts of the present case, we cannot say that the trial court abused its discretion in admitting the weapons. *See Weiner,* 534 F.2d at 18.

C. *Andrews.*

Andrews also contends that there is insufficient evidence to support his conviction for possession of contraband. The record shows that Andrews was arrested alone in the car in which the contraband was found, the contraband lying in a bag behind the front seat. From this evidence and the other surrounding circumstances in evidence, the finder of fact could rationally conclude that Andrews was guilty beyond a reasonable doubt. *See United States v. Irion,* 482 F.2d 1240, 1245-48 (9th Cir.), *cert. denied,* 414 U.S. 1026 (1973).

VII.

CONCLUSION

Davenport's conviction for facilitation of a conspiracy under 21 U.S.C. § 843(b) is reversed. All other convictions are affirmed.